

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GALE BRUCE SAGE
Claimant

VS.

PETERSON NURSING HOME, INC.
Respondent

AND

**KS HEALTHCARE ASSN WC
INS. TRUST**
Insurance Carrier

Docket No. 1,031,792

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 21, 2007, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery. Bruce Alan Brumley, of Topeka, Kansas, appeared for claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that the condition of claimant's back rendered him unemployable and granted him temporary total disability compensation commencing April 9, 2007, until further order, until certified as having reached maximum medical improvement, until released to a regular job, or until returned to gainful employment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 21, 2007, Preliminary Hearing and the exhibits, the transcript of the March 26, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends the ALJ exceeded his jurisdiction and ignored the uncontroverted evidence in the record and, therefore, the Board has jurisdiction over this appeal. Respondent argues that there is no medical evidence to support a finding of temporary total disability and requests that the Board reverse the ALJ's findings and vacate the preliminary hearing Order for Compensation.

Claimant requests that the Board dismiss the application for review for lack of jurisdiction since it does not address a compensability defense as listed in K.S.A. 44-534a. In the event the Board finds it has jurisdiction in this appeal, claimant contends the evidence concerning the job offer was controverted and the ALJ did not ignore uncontroverted evidence. Claimant contends that given his severe restrictions and respondent's inability to accommodate his restrictions, he is temporarily and totally disabled from earning substantial and gainful wages.

The issues for the Board's review are:

- (1) Does the Board have jurisdiction over this appeal?
- (2) If so, is claimant temporarily totally disabled?

FINDINGS OF FACT

Claimant was injured on August 24, 2006, when he was unloading a truck. He noticed pain in the center of his back and out to the left side. He was sent to the company doctor, who sent him to Dr. Michael Smith. Dr. Smith gave claimant restrictions that included only working four hours a day. Dr. Smith also gave claimant restrictions of desk work only, no lifting over 10 pounds, no pushing or pulling, and no lifting above shoulder level. Respondent abided by the four-hour work restriction for three or four days and then put claimant back to working a full eight-hour day. Respondent was not able to comply with the other restrictions, and claimant was required to push residents in wheelchairs to the feeding room. In December 2006, an agreement was entered between the attorney for claimant and the attorney for respondent, whereby claimant returned to working only four hours a day.

On January 15, 2007, claimant was evaluated by Dr. Adrian Jackson at the request of respondent. Dr. Jackson agreed with Dr. Smith's opinion concerning future treatment and restrictions. On February 20, 2007, claimant returned to Dr. Smith. Dr. Smith asked if he would be able to work an eight-hour day. Claimant told Dr. Smith he could not, and Dr. Smith retained the four-hour work restriction. After that visit, claimant was told by respondent that his care was being transferred to Dr. Jackson.

When claimant saw Dr. Jackson on March 12, 2007, he was given three options: (1) live with the pain, (2), surgery, and (3) more epidural steroid injections. Claimant said that Dr. Jackson discouraged the idea of surgery. Dr. Jackson also lifted claimant's four-hour per day work restriction, stating he thought it was reasonable for claimant to work full days with restrictions of no repetitive bending or lifting, no lifting above shoulder height, and no lifting loads exceeding 15 pounds.

Claimant was switched from four hours to eight hours a day on March 14, 2007. At that time, he was asked to sign a job description that included passing trays and drinks for meals and cleaning resident rooms, including bedside tables, drawers, closets, beds and chairs. He was to work from 7 a.m. to 1 p.m. and then be off for three hours, returning to work from 4 p.m. to 6:30 p.m. Claimant refused to sign the job description.

Claimant stated that making beds would be outside his restrictions because he needed to bend over, lift up the mattress, and pull up the sheets and the spread. He stated that although the lifting he did in making beds was over his 15-pound limit, his biggest problem in making beds was the repetitive bending. He would make an average of 10 to 15 beds in the morning. Claimant also said he had to bend over to check drawers and closets. Claimant testified he still had to push residents in wheelchairs and push a water pitcher cart, both of which were over his weight restriction.

Claimant filed an application for preliminary hearing requesting a change of authorized physician from Dr. Jackson and for temporary partial disability benefits. A preliminary hearing was held on March 26, 2007. On March 28, 2007, the ALJ denied claimant's motion to change physicians but stated that claimant should be taken off work because respondent was not able to honor the work restrictions of either Dr. Smith or Dr. Jackson.

Respondent paid temporary total benefits until April 9, 2007, when claimant was offered an accommodated job. A preliminary hearing was held on June 21, 2007, wherein claimant requested reinstatement of temporary total disability compensation. Claimant testified that his restrictions have remained the same and the job he was offered was the same job he had been doing earlier when the ALJ found that respondent was not able to honor his restrictions. The only difference on that job description was that respondent had both Dr. Smith and Dr. Jackson sign off on the description. Claimant would still have to lift, push, and pull when making beds. He would still have to push residents in wheelchairs and push carts. Claimant was asked to report back to work on April 16, 2007, for modified duty, and claimant declined to go back. The ALJ granted temporary total disability compensation, and respondent appeals.

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2006 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,¹ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.²

¹*Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

²See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

In *Overstreet*,³ the Kansas Court of Appeals stated that medical evidence was not necessary to support a finding of temporary total disability. Claimant's testimony alone was sufficient to prove that he was unable to work.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁵

ANALYSIS

Respondent argues that the ALJ's award of temporary total disability compensation to claimant without an opinion from the authorized physician that claimant cannot perform the accommodated job offered by respondent was contrary to statute. In addition, respondent contends the ALJ abused his discretion by ignoring uncontroverted evidence that claimant was capable of performing the job he was offered. Claimant disputed the accuracy of the job description that respondent provided the doctors and disputed that he could perform the job either within his restrictions or otherwise due to pain. The ALJ granted claimant's request for temporary total disability benefits because he determined claimant's back renders him unemployable at this time. The issue of whether a worker is entitled to temporary total disability compensation is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue of whether a worker is entitled to temporary total disability compensation is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing. Neither an allegation of error nor of an abuse of discretion confers jurisdiction upon the Board to review an ALJ's preliminary hearing decision when the ALJ did not exceed his jurisdiction and the appeal does not give rise to one of the issues deemed jurisdictional by K.S.A. 44-534a(a)(2).

CONCLUSION

An ALJ has the jurisdiction and authority to grant or deny temporary total disability benefits at a preliminary hearing. The ALJ did not exceed his jurisdiction by granting claimant temporary total disability compensation. This appeal does not give rise to any of the issues that are deemed jurisdictional by K.S.A. 44-534a(a)(2). Accordingly, the Board

³ *Overstreet v. Mid-West Conveyor Co., Inc.*, 26 Kan. App. 2d 586, 588, 994 P.2d 639 (1999).

⁴ K.S.A. 44-534a.

⁵ K.S.A. 2006 Supp. 44-555c(k).

does not have jurisdiction to address the issue raised in this appeal at this juncture of the proceedings.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the respondent's appeal is dismissed and the preliminary Order for Compensation of Administrative Law Judge Brad E. Avery dated June 21, 2007, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of September, 2007.

BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge